# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~311~~ 54.

MARTIN CONBOY, AS TRUSTEE IN BANKRUPTCY OF THE PHILLIP SEMMER GLASS COMPANY, LIMITED, BANKRUPT, APPELLANT,

*vs.*

FIRST NATIONAL BANK OF JERSEY CITY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT.

FILED JUNE 22, 1905.

(19,811.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 8, 1906.

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a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of PHILIP SEMMER GLASS COMPANY, LTD., Bankrupt. MARTIN CONBOY, Trustee, Appellant.

*Transcript of Record.*

Appeal from the District Court of the United States for the Southern District of New York.

Printed Under the Direction of the Clerk.

1 United States District Court, Southern District of New York.

In the Matter of the Petition of NEWARK GLASS COMPANY ET AL. to have PHILLIP SEMMER GLASS COMPANY Adjudged Bankrupt.

*Statement.*

1904.
May 23. Filed Referee's report on questions to be reviewed *In re* claim of First National Bank of Jersey City.
May 27. Filed notice of motion on petition to review Referee's order. Referee's order affirmed (Memo. Holt, *J.*)
June 7. Filed order affirming ruling of Referee allowing claim.
June 9. Filed assignment of errors.
June 11. Filed petition and allowance of appeal.
June 11. Filed citation on appeal.

2 United States District Court, Southern District of New York.

In the Matter of PHILLIP SEMMER GLASS CO., LIMITED, Bankrupt.

In Bankruptcy. No. 5757.

I, Macgrane Coxe, one of the Referees of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said cause before me there arose a question pertinent to the said proceedings, which question, together with a summary of the evidence relating thereto and the findings and order of the Referee thereon, are set forth in the opinion and order hereto annexed.

And the said question is certified to the Judge for his opinion thereon.

Dated at the County of New York, on the 23d day of May, A. D. 1904.

(Signed) MACGRANE COXE,
*Referee in Bankruptcy.*

3 United States District Court, Southern District of New York.

In the Matter of PHILLIP SEMMER GLASS CO., LIMITED, Bankrupt.

In Bankruptcy. No. 5757.

Claim of First National Bank of Jersey City.

Wilson & Wallis, for the bank.
Frank A. Clark, for the trustee.

MACGRANE COXE, *Referee:*

This is on the application of the trustee in bankruptcy for the re-examination of the claim against the bankrupt estate of the First National Bank of Jersey City.

The petition in bankruptcy, which was involuntary, was filed March 18, 1903. For some time prior to that date the bankrupt had had a deposit account in the claimant bank, and on said March 18, 1903, there was a balance due to the bankrupt from the bank on this account of $6,232.96. On the same day the bank held unmatured promissory notes made by various makers in favor of the bankrupt, which it had, upon endorsement by the bankrupt, and in the ordinary course of business, discounted for the bankrupt's account, and on which the bankrupt had received from the bank a sum largely in excess of the balance above mentioned. This bal-
4 ance the bank applied to the payment of these notes as far as it would go, and it has filed its claim, which is the subject of this proceeding for the remainder of the notes, amounting in all, including interest and protest fees, to $9,080.03. The notes all fell due within one year after the adjudication in bankruptcy. Payment thereon respectively was duly demanded and refused, and notice of protest given to the bankrupt as endorser.

The objections of the trustee are based upon the fact that the notes were unmatured on the day the petition in bankruptcy was filed. He urges that, for this reason, it was not within the right of the bank to offset the deposit in its hands against the indebtedness of the bankrupt on the endorsements, and that should it be permitted to do so, the result would be an unlawful transfer and a preference of the bank to the extent of the deposit over the bankrupt's other creditors of the same class.

It seems now well settled, and, indeed, the trustee does not deny that, had the notes fallen due before instead of after the filing of the petition, the offset would have been proper. There are a number of decisions to this effect, both under the present and the former Bankruptcy Acts (Hough *v.* First National Bank, 4 Biss., 349; Blair *v.* Allen, 3 Dill., 101; *In re* Farnsworth, 5 Biss., 224; *In re* Little, 6 Am. B. R., 681, 692; 110 F. R., 621; *In re* Elslasser, 7 Am. B. R., 215). And so, finally, is the decision of the Supreme Court of the United States in the recent case of New York County National Bank *v.* Massy (11 Am. B. R., 42; 192 U. S., 138). The ground of the

decision in this last case is that the bankrupt's deposit in the bank, under the circumstances, did not constitute a transfer as defined by the Bankruptcy Act, for the reason that the estate of the bankrupt was not diminished thereby, the bankrupt being at liberty freely to check against the deposit in the bank up to the time of the institution of the bankruptcy proceedings. The Court thereupon held that there was such mutuality between the two debts as permitted
5 one to be set-off against the other under Section 68 of the act.

This decision disposes of the objection of the trustee that the deposit here was a preferential transfer, and we have remaining only the question as to whether the fact that the notes here were unmatured at the time of the filing of the petition in bankruptcy eliminates that quality of mutuality which is required by Section 68, in order to permit of set-off.

The trustee's contention is that on the day of the filing of the petition there was no such mutuality; that there was, on that day, a debt due by the bank to the bankrupt, but no debt due by the bankrupt to the bank. He further contends that immediately upon the filing of the petition in bankruptcy other and paramount equities in favor of the general creditors of the bankrupt intervened, and became superior to the equities existing between the bankrupt and the bank; and that immediately thereupon the fund in the bank became impressed with a trust in favor of the general creditors of the bankrupt and could not be retained by the bank alone.

The trustee in support of this contention cites authorities of the New York and Pennsylvania courts, and there is no doubt that under the statutes of those States, the law is as he declares it to be. But the Bankruptcy Act creates a different rule of set-off, or rather, perhaps, better, adds to the classes of cases to which the rule is to be applied.

At common law, and under the statutes of New York and of other States, it is well settled that there can be no set-off unless the mutual debts are both due and payable in the hands of the parties for and against whom set-off is sought, that is to say, that unless they are presently payable as well as due the requisite mutuality does not exist (Munger *v.* Albany City Bank, 85 N. Y., 580-586). Under the Bankruptcy Statute, however, by Section 63*a*, a debt is declared provable against the bankrupt estate, that is, I take it, for the purposes of bankruptcy, payable out of the estate, although not
6 by its terms payable until after the filing of the petition, if only it be absolutely owing at that time. The operation of this section seems to be to hasten in such cases, and for the purposes of bankruptcy administration, the maturity of the debt.

In the case of Meyer *v.* Dickinson, 5 Am. B. R., 593; 107 F. R., 86, Judge Thomas maintained the right of set-off in such a case as the one under consideration against unmatured paper of the bankrupt firm, holding that upon the institution of bankruptcy proceedings another and different rule of set-off applied from that existing under the statutes of Pennsylvania.

It seems to be the provability of the debt which is the criterion of its availability for the purposes of set-off. It was so said *In re* Kalter, 2 N. B. N., 264, in which case such an offset as is sought here was

upheld. The fact that Section 68*b* prohibits a set-off of any debt which is not provable would point inferentially to the same conclusion.

There seems now to be no question, though it was at first much doubted, that the claim of the bank in this case is a provable claim, notwithstanding the immaturity of the paper at the date of the commencement of the bankruptcy proceedings. It was so held *In re* Gersen, 6 Am. B. R., 11; 107 F. R., 897. The Circuit Court of Appeals for the Third Circuit in that case, affirming the District Court, holds that the liability of a bankrupt endorser of commercial paper can be proved against his estate in bankruptcy, although the paper did not fall due until after the filing of the petition.

Nor should we overlook the use of the term "mutual credits" in addition to the term "mutual debts" in Sec. 68. While these terms are to be used as correlatives (Libby *v.* Hopkins, 104 U. S., 303), they are not to be construed as meaning one and the same thing (Lord Kenyon in Atkinson *v.* Elliott, 7 T. R., 378). The term mutual credits first appears in the English Bankruptcy System in the year 1705 (4 & 5 Anne, C. 17, Sec. 11), and it has been found in
7 all of our bankruptcy acts from the beginning (Act of 1800, Sec. 42; Act of 1841, Sec. 5; Act of 1867, Sec. 20; U. S. R. S., Sec. 5073). It has from the first been considered of importance, and as adding materially to the cases which were held comprised under the terms mutual debts. Thus, Robson on Bankruptcy, 7th Edition, p. 365, says:

"The right of set off given by the Bankruptcy laws, not being confined, as in the statutes of set-off, to mutual debts, but being extended to mutual credits * * * it necessarily applies to a much larger number of demands than is comprised in the term mutual debts. * * * One of the earliest questions which arose on the mutual credit clause was whether a debt payable *in futuro* could be set-off against a debt payable *in præsenti*. And this was decided in the affirmative on the ground that, though there might not be mutual debts actually payable between the parties, still there were mutual credits, and that the case came within the equities of the statute."

Under Sec. 20 of the Act of 1867, the language of which is substantially the same to that of Sec. 68 of the present act, such an offset as is here sought by the bank against an unmatured obligation was upheld (*Ex parte* Howard National Bank, 2 Lowell, 487; *In re* Petrie, 5 Ben., 110).

On the whole, I conclude that the mutuality required by the Bankruptcy Act existed, and that the offset was proper.

Objection is further made by the trustee, as to several of the notes, that they had not become due even at the time of the proof of claim was made, June 11, 1903. This is true, but they had all become due before the proof was closed in this proceeding, and it appears from the record that these notes, like the others, had been duly protested for non-payment, with notice to the bankrupt. These notes, therefore, are substantially in the same situation as the others, and
8 it follows that the same rules should apply to them.

All of the notes we have seen fell due within one year from

the date of the adjudication. It is not, therefore, necessary to decide, and is not decided what would be the result were this not the case, as affected by Section 57*n* of the Bankruptcy Act.

There should, however, be a deduction from the claim as filed. Under Section 63*a* there should be a deduction of interest on the several notes between the date of the filing of the petition and the maturity of the notes, respectively. This amounts to $110.76, and should be deducted from the amount of $9,080.03, set forth in the claimant's proof of claim. With this deduction the claim should be allowed.

An order may be submitted accordingly on notice or consent.

New York, May 7, 1904.

MACGRANE COXE,
*Referee in Bankruptcy.*

9 In the District Court of the United States for the Southern District of New York.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

At the City of New York, in said district, on the 13th day of May, 1904:

The trustees of the above named bankrupt having filed a petition and notice for the re-examination and rejection of the claim of the First National Bank of Jersey City, a creditor, against the estate of the said bankrupt; now, upon the evidence submitted to this Court upon the said claim and upon hearing counsel therein, it is

Ordered, that the amount of the said claim be reduced from $9,080.03, as set forth in the affidavit in proof of the claim filed by said creditor by deducting therefrom the sum of $110.76, the interest on the several notes set forth in the said affidavit between the date of filing the petition and the maturity of the notes, respectively, and by deducting the further sum of $450, the amount of the note of George H. Payne, which, as stipulated by counsel, has been collected by the creditor since the filing of its claim, making a total deduction of $560.76, and that the said claim as so reduced, amounting to $8,519.27, be and it is hereby allowed, and that the last mentioned sum be entered upon the books of the trustee as the true sum upon which dividends shall be computed.

MACGRANE COXE,
*Referee in Bankruptcy.*

10 United States District Court, Southern District of New York.

In the Matter of THE PHILLIP SEMMER GLASS COMPANY, Bankrupt.

In Bankruptcy. No. 5757.

To Macgrane Coxe, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner is the trustee of the above named bankrupt, and as such trustee filed a petition herein to expunge the
11 claim of the First National Bank of Jersey City, a creditor of the above named bankrupt.

That on the 13th day of May, 1904, an order denyink gaol

That on the 13th day of May, 1904, an order denying the said petition, a copy of which is hereto annexed, was made and entered herein.

That such order was and is erroneous, in that at the time of the filing of the petition in bankruptcy said bankrupt had on deposit in said bank the sum of $6232.96, payable on demand to it or to its order by check or otherwise.

That said bank refused to pay said deposit or any part thereof to the receiver of said bankrupt or to the trustee herein, but claimed the right under Section 68 of the Bankruptcy Act to apply said deposit as a set-off to the bankrupt's liability to, the bank on certain promissory notes made to the order of said bankrupt, and by it sold at discount and endorsed to said bank before the bankruptcy, and then held and still held by said bank. That said notes did not mature until after the filing of the petition in bankruptcy, and the bankrupt's liability thereon was not a mutual debt or a mutual credit between the estate of the bankrupt and said bank. And that said bank had not the right to apply said deposit as a set-off thereon or thereto. That said petition to expunge said claim should have been granted unless the bank withdrew said claim of set-off and paid the said deposit to the trustee.

And for the further reason that the application of the amount of said deposit as aforesaid to the payment of certain of the promissory notes so as aforesaid in possession of said bank and not matured at the date of the filing of the petition in bankruptcy was an undue and unlawful preference within the meaning of the bankruptcy statute and said bank should not have been allowed to prove any claim against the estate of said bankrupt until the repayment to the said estate of the amount so applied on the said promissory notes.

12 And for the further reason that on the 18th day — March, 1903, the duly appointed receiver in bankruptcy of the above named bankrupt demanded from said bank a surrender of the amount then on deposit to the credit of the above named bankrupt in said bank, which was the sum of $6,232.96, compliance with which said demand was refused and has been continuously refused by said bank.

And for the further reason that the said bank having received

the said preferences and transfers as above set forth, did not at any time surrender such preferences and transfers as required by the bankruptcy statute as a condition precedent to the proving of said claim.

And for all the other and further reasons contained in the objections to the claim of said bank filed by your petitioner on or about the 12th day of September, 1903.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the Bankruptcy Law of 1898 and General Order XXVII.

Dated May 17, 1904.

MARTIN CONBOY, *Petitioner.*

UNITED STATES OF AMERICA,
*County and Southern District of New York, ss:*

I, Martin Conboy, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true according to the best of my knowledge, information and belief.

MARTIN CONBOY.

Subscribed and sworn to before me this 17th day of May, 1904.

EDWARD F. MAGOFFIN,
[SEAL.] *Notary Public, New York Co.*

13 (Copy.)

$601.17/100. NEW YORK, *January 3d,* 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Six hundred and one 17/100 Dollars at the Lincoln National Bank.

Value received.

H. C. BROWNING.

No. Due May 3.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

$269.30/100. NEW YORK, *January 10th,* 1903.

Three months after date I promise to pay to the order of Phillip Semmer Glass Co. Two hundred and sixty-nine 30/100 Dollars, at 3638 Park Ave., N. Y. City.

Value received.

GEO. G. WACKER.

No. Due Apr. 10.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

$601.17/100. NEW YORK, *January* 9, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Six hundred and one 17/100 Dollars, at the Lincoln National Bank.
Value received.

H. C. BROWNING.

No. Due May 9.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

14 $1.25 fees.

$201.25. $200.00.

N. Y., *January* 12*th* 1903.

Three months after date I promise to pay to the order of Phillip Semmer Glass Co., Two hundred 00/. Dollars, at The New York Produce Exchange Bank.
Value received.

F. C. LOMONTE.

No. Due —.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres. New York City.

$349.00/100. NEW YORK, *Jan.* 12*th*, 1903.

Three months after date I promise to pay to the order of Phillip Semmer Glass Co., $349.00, Three hundred and forty-nine Dollars, at the Colonial Bank.
N. W. Corner Columbus Ave. & 83rd St., New York.
Value received.

WALTER STABLER.

No. Due Apr. 12/03.

(Endorsed:) Phillip Semmer Glass Co., Ltd., P. Anthony Brock, Treas.

$483.10. BROOKLYN, N. Y., *Jan'y* 21, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Four hundred and eighty-three 10/100 Dollars, at Hamilton Trust Co., Brooklyn, N. Y.
Value received.

POTTS & PARTRIDGE.

No. Due May 21.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

15 $384.74. NEW YORK, *Feb'y* 5, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Three hundred and eighty-four 74/100 Dollars, at the Lincoln National Bank.
Value received.

H. C. BROWNING.

No. Due June 5.

(Endorsed:) Phillip Semmer Glass Co., Jno. P. Semmer, Pres.

$493.65/100. N. Y., *January 24th*, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Four hundred and ninety-three 65/ Dollars, at the Jefferson Bank of New York.
Value received.

Z. K. BERLIN.

No. Due May 24.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

$597.37. NEW YORK, *Feb.* 6, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Gl. Co., Ltd., Five hundred and ninety-seven 37/100 Dollars, at the Mechanics & Traders' Bank.
Value received.

K. C. BROWN.

No. Due June 6.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

16 $425.00. FEBRUARY 9TH, 1903.

Four months after date, I promise to pay to the order of Phillip Semmer Glass Co., Lim., Four hundred and twenty-five Dollars at The 23rd Ward Bank, N. Y.
Value received.

W. C. HUNTER.

No. Due June 9.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

$498.93. NEW YORK, *February 13th*, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Four hundred ninety-eight and 93/100 Dollars at The Jefferson Bank of New York.
Value received.

Z. K. BERLIN.

No. Due June 13th.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

$350.00. NEW YORK, *February 17th*, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Three hundred and Fifty & 00/100 Dollars at Twelfth Ward Bank.

Value received.

GILBERT E. ORCUTT.

No. Due June 17th.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

17 $651.39 NEW YORK, *February 16th*, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co., Ltd., Six hundred fifyty-one & 39/100 Dollars at Mechanics & Traders' Bank.

Value received.

K. C. BROWN.

No. Due June 16th.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

$323.60/100. N. Y., *Feb'y 20th*, 1903.

Three months after date I promise to pay to the order of Phillip Semmer Glass Co., Three hundred and Twenty-three and 60/100 Dollars at The Jefferson Bank of New York.

Value received.

Z. K. BERLIN.

No. Due May 20.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

$425.00. NEW YORK, *February 20th*, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co., Limited, Four hundred and twenty-five & 00/100 Dollars, at the 23rd Ward Bank, N. Y.

Value received.

W. C. HUNTER.

No. Due June 20th.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

18 $489.20. NEW YORK, *February* 18, 1903.

Four months after date I promise to pay to the order of P. Semmer & Co. Four hundred and eighty-nine & 20/100 Dollars, at West Side Bank.
Value received.

PETER WAGNER,
247 *West* 127*th St.*

No. . Due June 18th.

(Endorsed:) P. Semmer & Co.—Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

$735.88/100. NEW YORK, *Feb.* 27*th,* 1903.

Three months after date I promise to pay to the order of Phillip Semmer Glass Co. Seven hundred and thirty-five 88 Dollars, at Colonial Bank.
Value received.

WALTER STABLER.

No. Due May 27/03.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Prest.

$283.28. NEW YORK, *March 6th,* 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co., Limited, Two hundred and eighty-three and 28/100 Dollars, at West Side Bank.
Value received.

PETER WAGNER,
247 *West* 127*th St.*

No. Due July 6th.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

19 $468.34. BROOKLYN, NEW YORK, *March 4th,* 1903.

Four months after date we promise to pay to the order of Phillip Semmer Glass Co. Four hundred and sixty-eight and 34/100 Dollars, at Hamilton Trust Co., Brooklyn, N. Y.
Value received.

POTTS & PARTRIDGE.

No. Due July 4th.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

$450.00. March 9th, 1903.

Three months after date I promise to pay to the order of Phillip Semmer Glass Co., Ltd., Four hundred and fifty 00/100 Dollars at Citizens' Trust Co., Paterson, N. J.

Value received.

GEO. H. PAYNE.

No. Due —.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

20 In the District Court of the United States for the Southern District of New York.

In the Matter of The Philip Semmer Glass Company, Limited, Bankrupt.

At Jersey City, in the District of New Jersey, on the — day of June, 1903, came George W. Conklin, and made oath and says: That he resides at Hackensack, in the State of New Jersey, and that he is the cashier of the First National Bank of Jersey City, a corporation organized under the laws of the United States and carrying on business as a national banking association at Jersey City, Hudson County, New Jersey, and that he is duly authorized to make this proof. That the above named Philip Semmer Glass Company, Limited, the corporation against which a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said bank in the sum of nine thousand and eighty 03/100 ($9,080.03) dollars, with interest; that the consideration of the said debt is as follows:

That at the dates specified in the annexed schedule, marked "A," and made part of this proof, the said bank, in the usual course of its business, at the request of said bankrupt, discounted and paid to or placed to the credit of the said bankrupt the proceeds of promissory notes, made by the makers named, and for the amounts specified in the said schedule, all of which were duly endorsed
21 by said bankrupt and delivered so endorsed, before maturity and for value, to the said bank, which is now the lawful owner and holder thereof; that no part of said notes has been paid, except the sum of nineteen 28/100 ($19.28) dollars, which has been credited on account of the note of G. G. Wacker, leaving a balance due on said note of $250.02, and the total amount of said notes $9,060.94; copies of said notes are hereto annexed; that at the dates of maturity of such of said notes as have matured, said dates being the due dates specified in said schedule, the said matured notes were duly presented for payment, and payment duly demanded, but was refused, and thereupon the said notes were duly protested for non-payment, and due notice thereof was given to said bankrupt, at an expense for protest fees as stated in said schedule, amounting to the sum of nineteen 09/100 ($19.09) dollars, making a total indebtedness of nine thousand eighty 03/100 ($9,080.03) dollars;

that there are no counterclaims or offsets to the same; and that the said bank has not, nor has any person by its order, or to the knowledge or belief of this deponent, for its use, had or received any manner of security for said debt whatever, except that judgment has been recovered in the City Court of New York in favor of the said bank against F. C. Lamonte, named in said schedule, upon his note therein specified, and execution has been issued upon said judgment, but has not been returned.

G. W. CONKLIN,
[SEAL.] *Cashier of First National Bank of Jersey City.*

Subscribed and sworn to before me this 11th day of June, 1903.
RAYMOND DAWSON,
[SEAL.] *Notary Public of N. J.*

22 SCHEDULE A.

| Maker. | Date 1903. | Time. | Due 1903. | Amount. | Protest fees. |
|---|---|---|---|---|---|
| H. C. Browning | Jan. 3 | 4 mo. | May 3 | $601 17 | $1 50 |
| G. G. Wacker | Jan. 10 | 3 " | Apr. 10 | 269 30 | 1 30 |
| H. C. Browning | Jan. 9 | 4 " | May 9 | 601 17 | 1 50 |
| F. C. Lamonte | Jan. 12 | 3 " | Apr. 12 | 200 00 | 1 25 |
| W. Stabler | Jan. 12 | " " | Apr. 12 | 349 00 | 1 50 |
| Potts & Partridge | Jan. 21 | 4 " | May 21 | 483 10 | 1 50 |
| H. C. Browning | Feb. 5 | " " | June 5 | 384 74 | 1 50 |
| Z. K. Berlin | Jan. 24 | " " | May 24 | 493 65 | 1 50 |
| K. C. Brown | Feb. 6 | " " | June 6 | 597 37 | 1 50 |
| W. C. Hunter | Feb. 9 | " " | June 9 | 425 00 | 1 50 |
| Z. K. Berlin | Feb. 13 | " " | June 13 | 498 93 | |
| G. E. Orcutt | Feb. 17 | " " | June 17 | 350 00 | |
| K. C. Brown | Feb. 16 | " " | June 16 | 651 39 | |
| Z. K. Berlin | Feb. 20 | 3 " | May 20 | 323 60 | 1 50 |
| W. C. Hunter | Feb. 20 | 4 " | June 20 | 425 00 | |
| Peter Wagner | Feb. 18 | " " | June 18 | 489 20 | |
| W. Stabler | Feb. 27 | 3 " | May 27 | 735 88 | 1 50 |
| P. Wagner | M'ch 6 | 4 " | July 6 | 283 28 | |
| Potts & Partridge | M'ch 4 | " " | July 4 | 468 34 | |
| Geo. H. Payne | M'ch 9 | " " | June 9 | 450 00 | 54 |
| | | | | $9,080 12 | $19 09 |

G. W. CONKLIN,
*Cashier of First National Bank of Jersey City.*

23 United States District Court, Southern District of New York.

In the Matter of the PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt. In Bankruptcy.

To the First National Bank of Jersey City, N. J., as Creditor, and Wilson & Wallis, Esqs., its Attorneys:

You will please take notice that Martin Conboy, the trustee herein, has filed a petition asking that your claim against the Phillip Sem-

mer Glass Company, Ltd., the above named bankrupt, be reconsidered and rejected, and that a hearing will be had on such petition at my office, No. 63 Wall street, in the Borough of Manhattan, City, County and State of New York, in said district, on the 17th day of September, 1903, at 10.30 o'clock A. M.

Dated September 12, 1903.

MACGRANE COXE,
*Referee in Bankruptcy.*

24 United States District Court, Southern District of New York.

In the Matter of the PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt. In Bankruptcy.

To Macgrane Coxe, Esq., Referee in Bankruptcy.

Your petitioner respectfully shows that he is the Trustee of the above-named bankrupt; that the proof of debt of the First National Bank of Jersey City, claiming to be a creditor of the said Phillip Semmer Glass Company, Limited, was filed herein on the 12th day of June, 1903.

That the said claim should not have been allowed, for the following reasons:

1. Because, according to the proof of claim filed by said First National Bank of Jersey City, and verified by its cashier, George W. Conklin, on the 11th day of June, 1903, the said bank claimed upon certain notes drawn by other parties and endorsed by the said bankrupt, which said notes at the time of the filing of the said proof of claim had not yet become due, and the liability of the bankrupt thereon had not at the time of said filing been determined or fixed.

2. Because the said bank, according to the record which it made in the pass-book showing the account — said bankrupt with it, admitted that on the 21st day of March, 1903, there was on deposit with it the sum of $6,232.96, which said sum is not accounted for in said proof of claim, but, your petitioner is informed and believes

25 that the said bank has attempted to offset against the amount alleged to be due to it on account of discounted paper not matured at the date of the said bankruptcy the amount of the said deposit; and your petitioner objects to such action on the part of the bank for the reason that if permitted it would enable the said bank to obtain a greater percentage of its debt than any other creditor of the same class, said bank having reasonable cause to believe that at the time said offset is claimed to have been effected a preference would be secured, in violation of the provisions of the bankruptcy statute.

3. Your petitioner further says that since the making of the said record admitting the existence of a balance in favor of the said Phillip Semmer Glass Company, Limited, on the 21st day of March, 1903, said bank, so your petitioner is informed and believes, had attempted to offset and counterclaim amounts due upon discounted

paper upon which the name of the bankrupt appeared as indorser, and which said paper had not matured at the time of the filing of the petition in bankruptcy against the said Phillip Semmer Glass Company, Limited, and your petitioner objects that the said bank could not legally offset and counterclaim amounts of paper in its possession not yet matured against amounts of deposit then in its possession belonging to the said bankrupt or to the receiver of the said bankrupt upon his appointment.

4. Your petitioner further says that on the various dates within the period of four months prior to the filing of the said petition in bankruptcy, said bank received various amounts upon deposit from said bankrupt, which said amounts the said bank, so your petitioner is informed and believes, subsequently offset and counterclaimed against the amounts of unmatured discounted paper upon which the name of the said bankrupt appeared as indorser, and your petitioner says that the said deposits were in effect a transfer to the said bank of the property of the said bankrupt, the effect of
26 which transfer, if permitted to stand, will be to enable the said bank to obtain a greater percentage of its debt than any other creditor of the same class, the said bankrupt having given the said preference and the said bank receiving it, having had reasonable cause to believe that it was intended thereby to give a preference in violation of the provisions of the bankrupt statute.

5. And your petitioner further says that the said bank had not the right to offset and counterclaim the amounts due upon unmatured paper upon which the name of said bankrupt appeared as indorser against the amount due upon deposit to the said bankrupt at the time of the filing of the petition in bankruptcy, for the reason that the respective obligations did not constitute mutual debts and mutual credits between the estate of the bankrupt and a creditor; that at the time of the filing of the said petition the account could not be stated and one debt set-off against the other within the meaning of the bankruptcy statute.

6. And your petitioner further says that the said amounts represented by the negotiable paper not matured did not represent a provable debt against the estate of the bankrupt as required by the bankruptcy statute in cases of set-offs and counterclaims.

7. And your petitioner further says that on the 18th day of March, 1903, Peter Alexander, receiver of the above named bankrupt, served a certified copy of the order of his appointment upon the said bank, as deponent is informed, by a reading of the report of the said Receiver, and thereby became entitled to the balance of the deposit in favor of the said Phillip Semmer Glass Company, Limited, which the said bank had in its possession and which the said bank admitted three days later, to wit, the 21st day of March, 1903, amounted to the sum of $6,232.96.

27 8. And your petitioner further says that the said bank had no right to hold said deposit against the maturing of any negotiable paper upon which the name of the said bankrupt appeared which had not become due at the time of the filing of the copy of the said Receiver's appointment.

9. And your petitioner further says that the said bank having received the said preference and transfers, as heretofore alleged herein, has not surrendered such preferences and transfers as required by the bankruptcy statute as a condition precedent to the proving of said claim.

10. And your petitioner further says that in divers other respects the said proof of claim is objectionable and it should not be allowed.

That the attorneys of said creditor are Wilson & Wallis, 48 Wall street, New York.

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore your petitioner prays that the said proof of claim be reconsidered and rejected.

MARTIN CONBOY, *Petitioner.*

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, Martin Conboy, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true according to the best of my knowledge, information and belief.

MARTIN CONBOY.

Subscribed and sworn to before me this 12th day of September, 1903.

EDWARD T. MAGOFFIN,
*Notary Public, New York Co.*

The foregoing papers from the certificate of the Referee to the petition to expunge constitute and are endorsed Certificate of Referee.

Filed May 23, 1904.

28 United States District Court, Southern District of New York.

In the Matter of the PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

In Bankruptcy. No. 5757.

SIRS: You will please take notice, that the issues raised by the petition for review of the order entered by the Referee herein on the 13th day of May, 1904, allowing the claim of the First National Bank of Jersey City will be brought to trial at a Stated Term of the United States District Court, appointed to be held in and for the Southern District of New York, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 23d day of May, 1904, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated New York, May 19, 1904.

FRANK A. CLARY,
*Attorney for Trustee,* 27 *Pine Street, New York City.*

To Wilson & Wallis, Esqs., Attorneys for First National Bank of Jersey City, 48 Wall Street, New York City.

(Endorsed:) Notice of motion.—Referee's order, affirmed May 27, 1904.—G. C. H.—Filed May 23, 1904.

29 At a Stated Term of the District Court of the United States for the Southern Disrtict of New York, held at the Post Office Building, in the City of New York, on the 7th day of June, 1904.

Present: Hon. George C. Holt, District Judge.

In the Matter of the PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

In Bankruptcy. No. 5757.

On reading and filing the petition of Martin Conboy, trustee of the above named bankrupt, verified the 17th day of May, 1904, and notice of motion thereon to review the order made by the Referee herein on the 13th day of May, 1904, allowing the claim of the First National Bank of Jersey City, as reduced by said order; and on the said order and all proceedings therein referred to; and on hearing counsel for the said trustee and said creditor, it is

Ordered, that the said order be and it is hereby affirmed.

GEORGE C. HOLT, *J.*

(Endorsed:) Order of Affirmance.—Filed June 7, 1904.

30 United States District Court, Southern District of New York.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LTD., Bankrupt.

In Bankruptcy. No. 5757.

*Petition on Appeal of Martin Conboy, Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, Bankrupt.*

The above named Martin Conboy, Trustee in Bankruptcy, considering himself aggrieved by the judgment made and entered on the 7th day of June, 1904, in the above entitled action, confirming the order of the Referee allowing the claim herein of the First National Bank of Jersey City in the sum of $8,519.27, does hereby appeal from such judgment to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which the said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

FRANK A. CLARY,
*Attorney for Martin Conboy, Trustee in Bankruptcy.*

The foregoing claim of appeal is allowed.

GEO. C. HOLT,
*District Judge.*

(Endorsed:) Petition on Appeal.—Filed June 11, 1904.

31 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, *Second Judicial Circuit, ss:*

To the First National Bank of Jersey City and Wilson & Wallis, Esqs., 48 Wall Street, N. Y. City, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit, to be holden at the City of New York, in the State of New York, on the 8th day of July next, pursuant to a petition on appeal and assignment of errors filed in the Clerk's office of the District Court of the United States, for the Southern District of New York in the Matter of the Phillip Semmer Glass Company, Limited, bankrupt, to show cause, if any there be, why the judgment rendered in said cause confirming the finding and order of the Referee in Bankruptcy allowing the claim of the First National Bank of Jersey City as reduced by said order as in said petition of appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. George C. Holt, Judge of said District, this 9th day of June, in the year of our Lord, One Thousand Nine Hundred and Four, and of the Independence of the United States of America the One Hundred and Twenty eighth.

GEO. C. HOLT,
*U. S. District Judge.*

(Endorsed:) Citation on Appeal.—A copy received June 10/04. Wilson & Wallis, Att'ys for 1st Nat. Bank of Jersey City.—Filed June 11, 1904.

32 United States District Court, Southern District of New York.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

In Bankruptcy. No. 5757.

And now on the 9th day of June, 1904, comes the said Martin Conboy, as Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, bankrupt, by Frank A. Clary, Esq., his solicitor, and says:

That the judgment entered in said cause on the 7th day of June, 1904, confirming the order of the Referee, allowing the claim of the First National Bank of Jersey City, is erroneous and against the just rights of the said Trustee in Bankruptcy for the following reasons:

First. Because the evidence shows that at the time of the filing of the petition in bankruptcy said bankrupt had on deposit in said bank the sum of $6,232.96. That at said time of the filing of the petition

in bankruptcy the bank held certain promissory notes in an amount greater than such deposit which notes were made to the order of the bankrupt and had been theretofore endorsed by the bankrupt to the bank, and upon which notes the bankrupt was then liable to the bank as endorser.

That the Receiver of the bankrupt demanded such deposit from the bank immediately after the filing of said petition in bankruptcy but the bank refused to surrender or pay the same and forth-
33 with, and before the maturity of any of said notes, applied the said deposit upon and against the bankrupt's said liability to the bank as endorser on certain of said notes.

The Court erred in holding and adjudging that the said bank had the right to make such set-off under Section 68*a* of the Bankruptcy Act.

Second. Because the evidence shows the facts recited in the first assignment of error herein and the Court erred in holding and adjudging that the application of the amount of such deposit as aforesaid to the payment of the bankrupt's liability as endorser of certain of the promissory notes, so as aforesaid in possession of said bank, and not matured at the date of the filing of the petition in bankruptcy, was not an undue and unlawful preference within the meaning of the Bankruptcy Act and in allowing the bank to prove any claim against the estate of said bankrupt before the re-payment to the said estate of the amount so applied on the said promissory notes.

Wherefore, the said Martin Conboy Trustee in Bankruptcy of said Phillip Semmer Glass Company, Limited, bankrupt, prays that said judgment affirming the action and ruling of the Referee allowing the claim of said the First National Bank of Jersey City in the sum of $8,519.27, be reversed and that the said Court may be directed to enter a judgment and order reversing the action, ruling and order of the Referee.

FRANK A. CLARY,
*Solicitor for Martin Conboy, Trustee in Bankruptcy of the Phillip Semmer Glass Company.*

(Endorsed:) Assignment of Errors.—Filed June 9, 1904.

34 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, Thomas Alexander, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this eighth day of July, in the year of our Lord one thousand nine hundred and four, and of the Independence of the said United States the one hundred and twenty-ninth.

[SEAL.] THOS. ALEXANDER, *Clerk.*

35 United States Circuit Court of Appeals for the Second Circuit.

No. 113. October Term, 1904.

Argued December 23, 1904; Decided January 12, 1905.

In the Matter of THE PHILLIP SEMMER GLASS COMPANY, LTD., Bankrupt.
MARTIN CONBOY, as Trustee, etc., Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before Judges Lacombe, Townsend, and Coxe.

This cause comes here on appeal from an order of the District Court, Southern District of New York, confirming a report of Referee in Bankruptcy which allowed the claim of the First National Bank of Jersey City for $8,519.27 against the bankrupt's estate.

*Per Curiam.*—It seems unnecessary to add anything to the discussion of the case which will be found in the report of the Referee (11 *Am. Bank Rep.* 665). It was held in *N. Y. County National Bank v. Massey* (129 *U. S.* 138) that, in the absence of fraud or collusion, a bank which holds promissory notes of a bankrupt need not surrender a deposit balance standing to the credit of the bankrupt on the day of the adjudication in bankruptcy, but may set it off against said notes and prove for the amount remaining due after such set-off. The appellant seeks to differentiate the case at bar on the ground that the notes held by the First National Bank were not due, at the date of adjudication (they have since matured) and
36 that the bankrupt was not the maker but the endorser—wherefore the notes did not constitute a "debt" of the bankrupt. His argument is interesting and ingenious but entirely disregards Section 1, Subdivision 11, of the Bankruptcy Act, which provides that the word "debt" when used in said act "shall include any debt, demand, or claim provable in bankruptcy." That meaning must be given to the word when used in the set-off section (68): "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid." To determine therefore whether the holder of a claim is entitled to the benefit of Section 68 it is necessary only to enquire whether his claim is one provable in bankruptcy.

We concur with the Court of Appeals for the Third Circuit (*Moch v. Market St. Nat. Bank,* 107 *F. R.* 897) in the conclusion that the liability of a bankrupt endorser of commercial paper which did not become absolute till after the filing of the petition is a debt provable in bankruptcy.

The order appealed from is affirmed with costs.

Martin Conboy, for the Appellant.

Hamilton Wallis, for the Appellee.

37 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 23rd day of January one thousand nine hundred and five.

Present: Hon. E. Henry Lacombe, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

In the Matter of the PHILIP SEMMER GLASS COMPANY, LTD., Bankrupt.
MARTIN CONBOY, as Trustee, etc., Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

W. K. T.
E. H. L.
A. C. C.

38 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. *In re* Semmer Glass Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 23, 1905. William Parkin, Clerk.

39 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.
MARTIN CONBOY, Trustee in Bankruptcy, Appellant,
*against*
THE FIRST NATIONAL BANK OF JERSEY CITY, Appellee.

*Petition for Rehearing.*

To the Hon. the Judges of the Circuit Court of Appeals for the Second Circuit:

Your petitioner, Martin Conboy, trustee in bankruptcy of the above named bankrupt, respectfully presents this his petition for a rehearing in the above entitled cause.

40 January 12, 1905, this Court handed down its decision in said cause allowing to the First National Bank of Jersey City the right of set-off claimed and asserted by said bank on filing its

proof of claim against the bankrupt's estate. Judgment was entered by the Clerk on said decision, January 23d, and the mandate thereon was issued on January 24th.

On February 20, 1905, the Supreme Court of the United States handed down its decision of the case of Western Tie and Timber Company against Brown. This decision appeared in the Banks Law Publishing Company advance sheets issued about March 15th, and in the West Publishing Company and Lawyers' Co-operative Company advance sheets issued early in April.

The ground of the Court's decision in the case at bar is that the right to set-off in bankruptcy was by Subdivision 11 of Section 1 of the present act enlarged and extended so that any two counter debts or claims, it is held, may now be set-off in bankruptcy if each of them could be proved in bankruptcy against the debtors respectively.

Having carefully examined the opinion of the Court, I think that with propriety I may ask the Court to consider whether this action be not one in which it will be proper to grant a rehearing to the appellant on the ground that the Supreme Court of the United States has, in the decision of the case of the Western Tie and Timber Company against Brown, indicated almost to a certainty that it considers the right to set-off under the present act to be precisely the same as it was under the Act of 1867; that it does not consider the right to set-off in bankruptcy to have been enlarged or extended by the definition of the word debt contained in Subdivision 11 of Section 1 of the present act.

The claim of the Western Tie and Timber Company against the estate of Harrison, the bankrupt in that case, was an ordinary debt for advances of money, and the claim of Harrison, the bank-
41 rupt, against the Western Tie and Timber Company was for money collected by said company as agent for Harrison. Each of these claims was a claim provable in bankruptcy. If the Western Tie and Timber Company had been the bankrupt, Harrison could certainly have proved his claim in bankruptcy against the estate of the Company.

But the Supreme Court held that the Western Tie and Timber Company had no right to a set-off of these claims because they were not "mutual debts or mutual credits," citing and reaffirming their decision under the Act of 1867 in Libby *v.* Hopkins, 104 U. S., 303.

I respectfully urge the Court to consider whether this decision is not really equivalent to a decision that the right to set-off has not been by the present Act extended to all cases where both debts are such as would be provable in bankruptcy against the estates of the debtors respectively; whether this decision is not really equivalent to a decision that the right of set-off in a court of bankruptcy under the present Act, is the same as it was under the Act of 1867, viz.: "The legal and equitable set-off of courts of law and equity, and nothing more."

That was the expression of the Supreme Court in its decision of the case of Sawyer *v.* Hoag, 84 U. S., 610. Similar language was also used in the decision of the case of Drake *v.* Rollo, 85 U. S., 629.

The decision in the case of Libby *v.* Hopkins, *supra,* is directly in line with these two decisions and manifestly, as it seems to me, these three Supreme Court decisions are but three different expressions of one and the same conclusion or principle, viz.: That the set-off jurisdiction of a court of bankruptcy is NOT greater or broader than the set-off jurisdiction of a court of equity.

If so, in accordance with the practice pointed out in the decision of Western Tie & Timber Company *v.* Brown, the First National Bank of Jersey City, in this case, should be compelled by the Court to file its claim for $15,000, instead of $8,500, and pay over
42 to the trustee the amount of the bankrupt's deposit retained by it.

I had relied upon the decisions of the Supreme Court under the Act of 1867, and upon the substantial justice and facts of the situation, in arriving at my conclusions as to the law of this case. But, as a matter of mere technical etymology even, it has seemed to me that the definition of the word "debt" in Subdivision 11 of Section 1 of the Act could have no application to the phrase "mutual debts or mutual credits" in Section 68. The inherent and necessary connotation of the word "mutual" is dual or plural; a "*mutual debt*" would be unthinkable and meaningless. The definition of the word "debt" is therefore useless in the interpretation of the phrase "mutual debts or mutual credits," and I cannot believe it was intended by the framers of the act to be used for that purpose. I urge the Court to observe again the title to Section 1 of the act printed in black face type. The section is a definition not merely of "words" but of "words and phrases." There are, in the section definitions of many phrases. If it had been intended to define the phrase "mutual debts or mutual credits," I believe the definition of that phrase would also have been inserted. Thus, although Section 1, Subdivision 9, provides a definition for the word "creditor," the framers of the act deemed it also necessary to define in Subdivision 23 the phrase "*secured cred-tor.*"

As a further ground for granting the appellant a rehearing in this case, I desire to call the Court's attention to the fact that even now it is very doubtful and uncertain, in view of the comparatively few times that the Supreme Court has passed upon such questions arising in bankruptcy cases, whether the trustee's right to review the judgment of this Court in the Supreme Court is by writ of *certiorari* or by appeal. It is probably *certiorari,* but even with the Supreme Court's unusual liberality in granting this writ
43 to review decisions in bankruptcy cases, of course if the judgment is appealable the writ would fail. So that in order to make sure of a review of the judgment by the Supreme Court it will be necessary for the trustee to go up both on *certiorari* and on appeal. This will necessitate the preparation of two records and the entire expense of review in two cases.

Wherefore, upon the foregoing grounds, your appellant and petitioner respectfully prays the Court to grant to him a rehearing of said cause.

FRANK A. CLARY,
*Attorney for and of Counsel with Martin Conboy, the Petitioner, 27 Pine St., New York.*

I, Frank A. Clary, of counsel for the appellant herein, do hereby certify that, in my judgment, the foregoing petition for a rehearing is well founded and that the same is not interposed for delay.

FRANK A. CLARY.

Dated, New York, May 5, 1905.

Endorsed: United States Circuit Court of Appeals, Second Circuit. Filed May 8, 1905. William Parkin, Clerk. Matter of Philip Semmer Glass Co. Motion for reargument denied. May 17, 1905.

44 At a Stated Term of the Circuit Court of Appeals of the United States held in and for the Second Circuit at the Post-Office Building in the City of New York, Southern District of New York on the 24th day of May, 1905.

Present: Hon. E. Henry Lacombe, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
*against*
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

The Court having rendered its decision on this appeal at said term, January 12th, 1905, and judgment thereon having been entered by the Clerk at said term, January 23rd, 1905, and the said Martin Conboy, Trustee, appellant, having presented a petition for a re-hearing at said term, and the said petition having been filed by the Clerk on the 8th day of May, 1905, and the Court having duly considered the said petition and having rendered its decision denying the said petition for a re-hearing at said term on the 17th day of May, 1905, it is

Ordered that the said petition for a re-hearing on this appeal be and the same is hereby denied.

E. H. L.
W. K. T.

45 Endorsed: United States Circuit Court of Appeals, Second Circuit. In the Matter of Phillip Semmer Glass Company, Limited, Bankrupt. Martin Conbot, Trustee, Appellant, against First National Bank of Jersey City, Claimant-Appellee. Order and notice of settlement. Frank A. Clary Attorney for Appellant, 27 Pine Street, New York. Copy received, May 22, 1905, Wilson & Wallis, Attys. for claimant United States Circuit Court of Appeals, Second Circuit. Filed May 24, 1905. William Parkin, Clerk.

46 In the Circuit Court of Appeals of the United States for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
*against*
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

*Assignment of Errors.*

And now, on the 27th day of May, 1905, comes the said Martin Conboy, as Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, Bankrupt, by Frank A. Clary, Esq., his solicitor and counsel, and says:

That the judgment rendered in said cause on the 23rd day of January, 1905, affirming the order of the United States District Court, allowing the claim of the First National Bank of Jersey City, and the order entered in said cause on the 25th day of April, 1905, denying the motion of the said trustees to have the said Circuit Court of Appeals for the Second Circuit recall its mandate and vacate the order thereon, and the order entered the 24th day of May, 1905, denying the petition for re-hearing, are erroneous and against the just rights of the trustee in bankruptcy for the following reasons:

First. For that the said Circuit Court of Appeals finds that the unmatured notes held by the First National Bank of Jersey City against the bankrupt and the claim of the bankrupt against
47 the said First National Bank of Jersey City on its deposit account were mutual debts and mutual credits and that the same should be set off one against the other; and for the further reason that the said Court finds that the allowance of said set off was not an unlawful preference within the true intent and meaning of the Bankrupt Law.

And the said appellant prays that the orders aforesaid may be reversed, annulled and altogether held for naught and that he may be restored to all things which he has lost by reason of said orders.

FRANK A. CLARY,
*Solicitor and Counsel for Appellant, Martin Conboy, Trustee, 27 Pine Street, New York.*

Endorsed: United States Circuit Court of Appeals, Second Circuit. In the Matter of Phillip Semmer Glass Company, Limited, Bankrupt. Martin Conboy, Appellant, against First National Bank of Jersey City, Claimant-Appellee. Assignment of Errors. Frank A. Clary, Solicitor and Counsel for Appellant, Martin Conboy, Trustee, 27 Pine Street, New York. United States Circuit Court of Appeals, Second Circuit. Filed May 27, 1905, William Parkin, Clerk.

48 In the Circuit Court of Appeals of the United States for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
*against*
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

*Petition for Appeal.*

To the honorable the Supreme Court of the United States:

The appeal of Martin Conboy, the Trustee of the Phillip Semmer Glass Company, Limited, Bankrupt, respectfully shows:

That upon the 18th day of March, 1903, a petition in bankruptcy was filed against the Phillip Semmer Glass Company, Limited, and pursuant to said petition an order of adjudication was duly entered therein on the 4th day of April, 1903, the proceeding being in the United States District Court for the Southern District of New York.

For some time prior to the date of the filing of the petition, the bankrupt had an account with the First National Bank of Jersey City, the claimant above named. On that date there was a balance due to the bankrupt from the claimant on this account of $6,232.96. On the same day, the bank held unmatured promissory notes made by various makers in favor of the bankrupt and, in the ordinary course of business, discounted for the bankrupt's account. The amount of these notes, so discounted, was $15,293.90. On the
49 12th day of June, 1903, a proof of debt was filed by the said claimant in the bankruptcy proceeding, in which the claimant alleged that the bankrupt was, at and before the filing of the petition in bankruptcy, indebted to the bank in the sum of $9,080.03, this amount being the aggregate of various notes of other parties endorsed by the bankrupt and discounted by the bank. The account between the bankrupt and the bank was the ordinary and usual deposit account kept between banker and depositor.

The Trustee objected to the proof of claim and petitioned that it be disallowed for the reason that the bank had utilized the amount on deposit with it on the filing of the petition in bankruptcy in payment of other notes than those proved on, similarly made, endorsed and discounted which had not matured at the time of the filing of the petition.

After testimony was taken establishing the above facts, the referee held that the claimant was permitted by the provisions of §68 of the Bankrupt Act to set off against the unmatured obligations of the bankrupt, the amount on deposit to the credit of the bankrupt and denied the trustee's petition. The said referee held that the said notes and the said deposit account constituted mutual debts and mutual credits between the said First National Bank of Jersey City and the said bankrupt, and that the same should be set off one

against the other, and that the said First National Bank of Jersey City had properly filed its proof of claim for the balance only, and that the same was properly allowed and dividends should be paid thereon.

Thereafter the said trustee, feeling aggrieved by the action of the referee, sought a review of the decision of said referee by petition for that purpose and the matter coming on to be heard before the District Court of the United States in the Southern District of New York, the ruling of said referee was affirmed; and the trustee,
50 still feeling himself aggrieved, appealed from the said order of the District Court to the Circuit Court of Appeals for the Second Circuit, and, the said appeal duly coming on to be heard, the said Circuit Court of Appeals affirmed the said order of the District Court, holding that the said notes and the said deposit account constituted mutual debts and mutual credits between the said First National Bank of Jersey City and the bankrupt and, on the 23rd day of January, 1905, an order was duly entered and filed by the said Circuit Court of Appeals affirming the order of the District Court and the ruling of the said referee as aforesaid.

That in view of the fact that no findings of fact and conclusions of law were filed by the said Circuit Court of Appeals prior to or at the time of the re-dition of said judgment, the trustee, on or about the 25th day of April, 1905, petitioned the said Circuit Court of Appeals for the Second Circuit to recall its mandate and vacate the order for the same on the ground that the judgment rendered was irregular; That said petition came on to be heard on the said 25th day of April, 1905 and, after due consideration thereof, said motion was denied.

Thereafter and on the 8th day of May, 1905, said trustee presented a petition for re-hearing in due form to the said Circuit Court of Appeals for the Second Circuit, relying upon the decision of the Supreme Court of the United States in the case of Western Tie & Timber Co. *v.* Brown, 196 U. S. 502. That said petition was duly considered by the said Circuit Court of Appeals for the Second Circuit and, on the 24th day of May, 1905, an order on their decision so rendered on the 17th day of May, 1905, was entered denying the same.

That as the appellant, Martin Conboy, Trustee, is informed and believes, in the proceedings above recited, errors have been
51 committed by the learned Circuit Court of Appeals in holding that the First National Bank of Jersey City had properly filed its proof of claim, and that the same was properly allowed and dividends should be paid thereon, by reason of all of which your petitioner has sustained grievous loss.

Wherefore this Appellant appeals from the whole of the said order of affirmance of the Circuit Court of Appeals for the Second Circuit, dated the 23rd day of January, 1905, and from the whole of the said order of the Circuit Court of Appeals for the Second Circuit, dated the 25th day of April, 1905, denying the motion of your petitioner to recall the mandate of said Court and cancel the order for same, and from the whole of the said order of the Circuit Court

of Appeals for the Second Circuit, dated the 24th day of May, 1905, denying the petition of the said trustee for a re-hearing; and respectfully prays that the said orders and decrees and the pleadings may be sent to the Supreme Court of the United States without delay and that the said Supreme Court will proceed to hear the said cause, and that the said orders and decrees of the Circuit Court of Appeals for the Second Circuit and every part thereof may be reversed and a decree made directing that the claim of the said First National Bank of Jersey City, as filed, be disallowed, and that your petitioner may — such other and further relief in the premises as may be just.

Dated, May 24th, 1905.

FRANK A. CLARY,
*Solicitor and Counsel for Appellant, Martin Conboy, Trustee,* 27 *Pine Street, New York.*

Allowed May 27, 1905.
R. W. PECKHAM,
*Asso. Jus. Sup. Ct. U. S.*

52 Endorsed: United States Circuit Court of Appeals, Second Circuit. In the Matter of Phillip Semmer Glass Company, Limited, Bankrupt. Martin Conboy, Trustee, Appellant, against First National Bank of Jersey City, Claimant-Appellee. Petition for Appeal. Frank A. Clary, Solicitor and Counsel for Appellant, Martin Conboy, Trustee, 27 Pine Street, New York. United States Circuit Court of Appeals, Second Circuit. Filed June 14, 1905. William Parkin, Clerk.

53 In the Circuit Court of Appeals of the United States for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
*against*
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

*Certificate of Justice of the Supreme Court of the United States.*

In this cause, I hereby certify that, in my opinion, the determination of the question or questions involved in the allowance or rejection of the claim of the First National Bank of Jersey City is essential to a uniform construction of the Bankrupt Law throughout the United States.

This certificate is made conformably to Act of Congress of July 1, 1898, § 25-*b*, paragraph 2.

Dated this 27 day of May, A. D. 1905.

R. W. PECKHAM,
*Asso. Jus. Sup. Ct. U. S., Washington,*

Endorsed: United States Circuit Court of Appeals, Second Circuit. In the Matter of Phillip Semmer Glass Company, Limited, Bankrupt. Martin Conboy, Trustee, Appellant, against First National Bank of Jersey City, Claimant-Appellee. Frank A. Clary, Solicitor and Counsel for Appellant, Martin Conboy, Trustee, 27 Pine Street, New York. United States Circuit Court of Appeals, Second Circuit. Filed June 14, 1905. William Parkin, Clerk.

54 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
*against*
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

*Findings of Fact and Conclusions of Law.*

This case coming here on appeal from an order of the District Court of the United States for the Southern District of New York, which affirmed an order of the Referee allowing a claim of the First National Bank of Jersey City against the contention of the Trustee in Bankruptcy that said claim embraced the allowance of a set off which did not exist under the bankrupt law, and that the said creditor had received a preference from the bankrupt and should not be allowed to prove its claim unless and until it first surrendered the amount sought to be set off, constituting the alleged preference, and the court having affirmed the order appealed from and the said trustee, Martin Conboy, having procured the allowance of an appeal from said judgment with a certificate under Section 25-*b*, Paragraph 2 of the Bankrupt Act by a Justice of the Supreme Court,

Now, therefore, we make the following findings of fact and conclusions of law to be included in the record on said appeal
55 *nunc pro tunc* as though the same were made and filed at the time of the entry of the judgment of this Court on the 23rd day of January, 1905.

*Findings of Fact.*

I. On March 18th, 1903, a petition to procure an adjudication that the Phillip Semmer Glass Company, Limited, was a bankrupt was filed in the District Court of the United States for the Southern District of New York and the said Phillip Semmer Glass Company, Limited, was thereafter adjudicated a bankrupt.

II. On March 18th, 1903, a receiver was appointed of the alleged bankrupt and on the same day served a certified copy of the order of his appointment on the First National Bank of Jersey City.

III. For some time prior to March 18th, 1903, the bankrupt had had a deposit account in the claimant bank, and on said March 18th,

1903, there was a balance due the bankrupt from the bank on this account of $6,232.96. On the same day the bank held unmatured promissory notes made by various makers in favor of the bankrupt which it had, upon endorsement by the bankrupt and in the ordinary course of business, discounted for the bankrupt's account and on which the bankrupt had received from the bank a sum largely in excess of the balance above mentioned. This balance the bank applied to the payment of these notes as far as it would go and then filed its claim for the remainder of the notes, amounting in all including interest and protest fees to $9,080.03. The notes all fell due within one year after the adjudication in bankruptcy. Payment thereof respectively was duly demanded and refused and notice of protest given to the bankrupt as endorser. The following is a list of the notes charged against the deposit:

| 56 Maker. | Date. | Time. | Due. | Amount. | Protest fees. |
|---|---|---|---|---|---|
| Potts & Partridge.... | Dec. 8/02 | 4 m. | Apr. 8/03 | 818.63 | 1.30 |
| " .... | Dec. 20/02 | " | Apr. 20/03 | 796.70 | 1.30 |
| G. E. Orcutt. ..... | Jan. 6/03 | " | May 6/03 | 553.68 | 1.50 |
| " ..... | Nov. 22/02 | " | M'ch 22/03 | 714.00 | 1.50 |
| K. C. Brown..... ... | Nov. 22/02 | " | " | 799.83 | 1.50 |
| " ..... | Dec. 5/02 | " | Apr. 5/03 | 739.89 | 1.50 |
| Z. K. Berlin..... | " | " | " | 503.85 | 1.50 |
| G. M. Taylor..... | Dec. 11/02 | " | Apr. 11/03 | 498.95 | 1.50 |
| W. C. Hunter..... | Dec. 24/02 | " | Apr. 24/03 | 300.00 | 1.50 |
| H. C. Browning..... | Dec. 15/02 | " | Apr. 15/03 | 488.25 | 1.50 |
| | | | | 6,213.78 | 14.60 |

The following is a list of the notes for which a claim is filed,—

| Maker. | Date. | Time. | Due. | Amount. | Protest fees. |
|---|---|---|---|---|---|
| | 1903. | | 1903. | | |
| H. C. Browning..... | Jan. 3 | 4 mo. | May 3 | 601.17 | 1.50 |
| G. G. Wacker. ..... | Jan. 10 | 3 " | Apr. 10 | 269.30 | 1.30 |
| H. C. Browning..... | Jan. 9 | 4 " | May 9 | 601.17 | 1.50 |
| F. C. Lamonte..... | Jan. 12 | 3 " | Apr. 12 | 200.00 | 1.25 |
| W. Stabler..... | Jan. 12 | " " | Apr. 12 | 349.00 | 1.50 |
| Potts & Partridge..... | Jan. 21 | 4 " | May 21 | 483.10 | 1.50 |
| H. C. Browning..... | Feb. 5 | " " | June 5 | 384.74 | 1.50 |
| Z. K. Berlin..... | Jan. 24 | " " | May 24 | 493.65 | 1.50 |
| K. C. Brown..... | Feb. 6 | " " | June 6 | 597.37 | 1.50 |
| W. C. Hunter ..... | Feb. 9 | " " | June 9 | 425.00 | 1.50 |
| Z. K. Berlin..... | Feb. 13 | " " | June 13 | 498.93 | |
| G. E. Orcutt .... ..... | Feb. 17 | " " | June 17 | 350.00 | |
| K. C. Brown. ..... | Feb. 16 | " " | June 16 | 651.39 | |
| Z. K. Berlin..... .... | Feb. 20 | 3 " | May 20 | 323.60 | 1.50 |
| W. C. Hunter..... | Feb. 20 | 4 " | June 20 | 425.00 | |
| Peter Wagner..... | Feb. 18 | " " | June 18 | 489.20 | |
| W. Stabler .... ..... | Feb. 27 | 3 " | May 27 | 735.88 | 1.50 |
| P. Wagner..... ..... | M'ch 6 | 4 " | July 6 | 283.28 | |
| Potts & Partridge..... | M'ch 4 | " " | July 4 | 468.34 | |
| Geo. H. Payne..... | M'ch 9 | " " | June 9 | 450.00 | .54 |
| | | | | $9,080.12 | $19.09 |

The account between the bankrupt and the bank was the ordinary and usual deposit account between banker and depositor.

IV. The trustee moved to expunge the claim of the bank on the ground that it was not within the right of the bank to off set the deposit in its hands against the obligations of the bankrupt on the endorsements and should it be permitted to do so the result would be an unlawful transfer and a preference of the bank to the extent of the deposit over the bankrupt's other creditors of the same class.

57 The referee denied that motion and an appropriate order was made and entered. The trustee, thereupon, duly filed his petition to have the ruling reviewed by the District Judge. The District Judge on the 7th day of June, 1904, made an order affirming the order of the referee. From that order an appeal was taken to the Circuit Court of Appeals for the Second Circuit and the Circuit Court of Appeals, on the 23rd day of January, 1905, entered an order affirming the order of the District Court and the ruling of the referee. On the 8th day of May, 1905, the trustee presented a petition for rehearing to the said Circuit Court of Appeals for the Second Circuit and the same, having been considered by the said Circuit Court of Appeals at the term at which said judgment had been rendered, was, on *on* the 24th day of May, 1905, denied. The trustee having expressed the wish to obtain a review of the decision of this court, in the Supreme Court, these findings of fact and conclusions of law in conformity with General Order 36 were made and ordered filed *nunc pro tunc* as of the date of filing of opinion sustaining the District Court.

*Conclusions of Law.*

I. That the claim of the First National Bank of Jersey City on account of the unmatured notes endorsed by the bankrupt and held by said bank and the claim of the bankrupt against the said First National Bank of Jersey City on its deposit account were mutual debts and mutual credits and that the said bank was entitled to set off one against the other.

II. That the allowance of said set off is not an unlawful preference within the true intent and meaning of the Bankrupt Law.

E. H. LACOMBE,
*U. S. Circuit Judge.*
WM. K. TOWNSEND,
*U. S. Circuit Judge.*
ALFRED C. COXE,
*U. S. Circuit Judge.*

Endorsed: United States Circuit Court of Appeals, Second Circuit. In the Matter of Philip Semmer Glass Company, Limited, Bankrupt.—Martin Conboy, Trustee, Appellant, against First National Bank of Jersey City, Claimant-Appellee. Findings of Fact and Conclusions of Law.—Frank A. Clary, Solicitor and Counsel for Appellant, Martin Conboy, Trustee, 27 Pine Street New York.—United States Circuit Court of Appeals, Second Circuit. Filed June 14, 1905. William Parkin, Clerk.

58 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from — to — inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Matter of Phillip Semmer Glass Company, Limited, Bankrupt. Martin Conboy, Trustee, Appellant, as the same remain of record and on file in my office, made up pursuant to General Order in Bankruptcy No. 36, Section 3.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of June in the year of our Lord One Thousand Nine Hundred and Five and of the Independence of the said United States the One Hundred and twenty-ninth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

59 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
*against*
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

*Affidavit.*

STATE OF NEW YORK, *County of New York, ss:*

Frank A. Clary being first duly sworn, says:

That he is the attorney and solicitor for Martin Conboy, trustee, the appellant herein; that on the 1st day of June 1905 at the office of Wilson & Wallis, attorneys and solicitors for the First National Bank of Jersey City, appellee herein, at No. 48 Wall Street, Borough of Manhattan, New York City, he delivered a copy of the annexed citation on appeal to the Supreme Court of the United States, to William G. Wilson, one of said attorneys and solicitors for said appellee.

FRANK A. CLARY.

Sworn to before me this 7th day of June 1905.

[Seal of Edward T. Magoppin, Notary Public, New York County.]

EDWARD T. MAGOPPIN,
*Notary Public, New York Co.*

60 In the Circuit Court of Appeals of the United States for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
*against*
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

*Citation.*

UNITED STATES OF AMERICA, *ss:*

To the First National Bank of Jersey City and Wilson & Wallis, its attorneys, 48 Wall Street, New York City:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the 26 day of June 1905, pursuant to a petition of appeal filed in the Office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit, wherein Martin Conboy, Trustee, is Appellant and you are Appellee, to show cause, if any there be, why the orders and decrees of the said Circuit Court of Appeals for the Second Circuit herein and mentioned in the said petition should not be corrected and speedy justice done to the parties in that behalf.

Dated, May 27 1905.

R. W. PECKHAM,
*Asso. Jus. Sup. Ct. U. S.*

61 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of Phillip Semmer Glass Company, Limited, Bankrupt. Martin Conboy, Trustee, Appellant, against First National Bank of Jersey City, Claimant-Appellee. Citation. Frank A. Clary, Solicitor and Counsel for Appellant, Martin Conboy, Trustee, 27 Pine Street, New York. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 14, 1905. William Parkin, Clerk.

Endorsed on cover: File No. 19,811. U. S. circuit court appeals, 2d circuit. Term No. 309. Martin Conboy, as trustee in bankruptcy of The Phillip Semmer Glass Company, Limited, bankrupt, appellant, *vs.* First National Bank of Jersey City. Filed June 22d, 1905. File No. 19,811.

FILE COPY.

OCT 23 1905

JAMES H. McKENNEY,
Cl

# Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted]54

IN THE MATTER

*of*

PHILLIP SEMMER GLASS COMPANY, LIMITED,
*Bankrupt.*

MARTIN CONBOY, TRUSTEE,
*Appellant,*

*against*

FIRST NATIONAL BANK OF JERSEY CITY,
*Claimant-Appellee.*

## BRIEF FOR APPELLANT ON MOTION.

MARTIN CONBOY,
*Of Counsel.*

EVENING POST JOB PRINTING OFFICE, NEW YORK.

# Supreme Court of the United States.

| | |
|---|---|
| IN THE MATTER OF PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt. | October Term, 1905. No. 309. |
| MARTIN CONBOY, Trustee, Appellant, AGAINST FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee. | |

## Brief for Appellant on Motion to Dismiss or Affirm.

### THE HISTORY OF THIS LITIGATION.

On March 18th, 1903, a petition in bankruptcy was filed against the Phillip Semmer Glass Company, Limited, and an order of adjudication sub-

sequently entered. For some time prior to the filing of the petition the bankrupt had an account of the ordinary and usual deposit character with the First National Bank of Jersey City. At the time of the filing of the petition the balance due to the bankrupt on this account amounted to $6,232.96. At the same time the bank held unmatured promissory notes, made by various makers in favor of the bankrupt, on which the bankrupt was endorser, amounting to $15,293.90.

The bank applied the money in its hands *pro tanto* to the payment of the notes endorsed by the bankrupt and filed a claim for the balance.

The trustee objected to the proof of claim and petitioned that it be disallowed on the ground that it was not permissible under the Bankrupt Act for the bank to apply as a set-off the amount on deposit. After proofs taken and hearing had, the referee, on May 13, 1904, rendered a lengthy opinion in favor of the bank, and then made an order allowing the claim and affirming the right of set-off.

The trustee immediately petitioned for a review of the decision of the referee, and on June 7, 1904, after a hearing on this petition, the ruling was affirmed by the District Court.

The trustee thereupon, within the time limited by law, appealed from the order of the District Court to the Circuit Court of Appeals for the Second Circuit, and, after argument, the Circuit Court of Appeals rendered a decision affirming the previous orders entered in the case.

Subsequent to the entry of the order in the Circuit Court of Appeals, the decision of this Court in the case of Western Tie & Timber Company *v.* Brown, 196 U. S., 502, appeared in the United States Reports, and as the opinion of this Court expressed in that decision was at variance with the

opinion of the Circuit Court of Appeals in this case, as counsel for the appellant believed, it was determined to take an appeal.

The same term of the Circuit Court of Appeals, continuing, a motion was made to recall the mandate and vacate the order for the same on the ground that the judgment rendered was irregular for the reason that no findings of fact and conclusions of law had been filed as required by General Order No. 36. The petition came on to be heard, and, after due consideration, the motion was denied.

Thereupon, and at the same term, the trustee, relying upon the decision of this Court in the case of Timber Company *v.* Brown, *supra*, presented a petition for rehearing in due form to the Circuit Court of Appeals, and this petition having been duly considered by that Court at the same term at which the original order was made, was on the 17th of May, 1905, denied, and upon this decision an order was entered on the 24th of May, 1905.

Within three days from the entry of this order, namely, on the 27th day of May, 1905, a petition for appeal to this Court from the judgment of the Circuit Court of Appeals, entered the 23d day of January, 1905, was presented to Mr. Justice Peckham and was allowed on the same day. A certificate was signed by Mr. Justice Peckham to the effect that, in his opinion, a determination by this Court of the questions involved in connection with the claim of the bank was essential to a uniform construction of the Bankrupt Law throughout the United States. Assignment of errors was filed at the same time and an appeal conformably to Section 25-*b*, paragraph 2, of the Bankrupt Law, thereby perfected, which is now pending in this Court.

## POINT I.

### The motion to dismiss should be denied, as this Court has jurisdiction to entertain this appeal.

The appeal was properly taken. The case was not finally disposed of by the Circuit Court of Appeals until the adjournment of the term at which the judgment was rendered. All judgments and decrees are under the control of the court during that period and may be opened or reviewed.

The petition for re-hearing was addressed to the discretion of the Court. The Court duly considered it. By this the effect of the final decree was suspended. Substantially the decree was not final until the 24th day of May, 1905, within thirty days from which date the appeal was perfected.

Brockett *et al. v.* Brockett, 2 How., 238.

In most of the Federal Circuits, the time within which a petition for rehearing must be presented has been limited by local rules; thus, in the first circuit, a petition must be presented within one month; in the fifth, twenty days; sixth, thirty days; seventh, thirty days; and in the ninth, fifteen days after opinion or judgment.

The only provision governing petitions for rehearing in the second circuit is that contained in original Rule 29 of the Circuit Court of Appeals limiting the time for the presentation of such petition to the term at which the judgment is entered.

In accordance with the rule of the second circuit, the petition in question, as shown by the order denying the application for re-hearing, was presented at the term at which the judgment was en-

tered and, therefore, under the decisions of this Court, operated as a suspension of the judgment until a determination thereon had been had by the Circuit Court of Appeals.

The time to appeal from the final decree did not begin to run until the petition for rehearing had been decided.

> Aspen Mining & Smelting Company *v.* Billings, 150 U. S., 31.
> Voorhees *v.* Noye Manufacturing Company, 151 U. S., 35.

Counsel for appellant, in connection with the limitation of time fixed by the General Orders, contends that the short period of thirty days within which an appeal must be taken is intended to prevent the tying up of bankrupt estates by prolonged litigations over disputed claims. A similar contention was formerly made with regard to the shorter period of ten days within which, under the former provisions of the Judiciary Act, an appeal should be perfected in order that it might operate as a *supersedeas*. This Court has uniformly held that the ten days fixed by the former provisions and the thirty days now fixed by the provisions of the Judiciary Act do not begin to run until the decision of a petition for a rehearing or a motion to set aside the decree has been disposed of by the Court.

The Slaughter-house Cases, 10 Wall., 273, were on writs of error to the Supreme Court of the State of Louisiana.

> "Petitions for re-hearing were filed by the losing parties on the 26th of April, 1870, and on the 9th of May following an entry was made in each case that the petition for re-hearing was refused. Writs of error to the state court were subsequently prayed by the same parties, and on the 13th of May last,

the writs of error were allowed by the Associate Justice of this court allotted to that Circuit, and they were duly filed on the 16th day of the same month as appears by the record.

"Filed as the writs of error were, within ten days from the date of the entry refusing the petition for re-hearing, it is claimed by the plaintiffs that the several writs of error operate as a *supersedeas* and stay execution under the twenty-third section of the Judiciary Act. Doubts were at one time entertained upon that subject, but since the decision in the case of Brocket *v.* Brocket (2 How., 238) the question must be considered as settled in accordance with the views of the plaintiffs."

Mr. Justice Clifford in Slaughter-house Cases, 10 Wall., 289.

See also in this connection

Railroad Company *v.* Bradleys, 7 Wall., 575, and

Memphis *v.* Brown, 94 U. S., 715.

In the latter case a judgment granting a peremptory mandamus was entered on March 2, 1876. Afterwards, during the same term, May 20th, the City appeared and moved the Court to set aside the order of March 2d; but this motion was refused and that order re-entered as the final judgment of the Court in the premises. A writ of error was sued out upon this last judgment and a *supersedeas* perfected by giving the required bond within sixty days thereafter.

This Court, by Chief Justice Waite, ruled that

"* * * the motion made during the term to set aside the judgment of March 2 suspended the operation of that judgment so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of."

Memphis *v.* Brown, 94 U. S., 715, 716, 717.

Texas & Pacific Railway Co. *v.* Murphy (111 U. S., 488) was on a motion to dismiss the writ of error united to a motion to affirm. The facts as shown in the opinion of Chief Justice Waite were as follows:

"On the 29th of May, 1883, a judgment was entered by the Supreme Court of Texas affirming a judgment of the District Court of Harrison County. The following entry appears in the record under date of December 21st, 1883:

"'Appeal from Harrison.

| | |
|---|---|
| "'THE TEXAS PACIFIC RAILROAD COMPANY<br>v.<br>JAMES MURPHY. | No. 422.<br>Case 1111. |

"'Opinion of the court delivered by Mr. Justice Slayton. Mr. Chief Justice Willie not sitting in this cause.

"Motion of the appellant for a rehearing in this cause came on to be heard, and the same having been considered by the court, it is ordered that the motion be overruled and the rehearing refused; that the appellant, the Texas Pacific Railway Company, pay all the costs of this motion.

* * * * * * *

"It is expressly ruled in Brocket *v.* Brocket, which has been followed in many cases since, that if a petition for rehearing is presented in season and entertained by the court, the time limited for an appeal or writ of error does not begin until the petition is disposed of. Slaughter House Cases, 10 Wall., 273, 289; Memphis *v.* Brown, 94 U. S., 715, 717. The motion for rehearing in this case was not decided until December 21st,

and the writ of error was sued out and served within sixty days thereafter. This was in time to secure the supersedeas."

Texas & Pacific Railway Co. *v.* Murphy, 111 U. S., 488, 489, 490.

Of course, if the petition for a rehearing is not presented by a party who is entitled to present it, as in Sage *et al. v.* Central Railroad Company *et al.*, 93 U. S., 412, 418, 419; or if it is not presented at the proper term, as in Cambuston *v.* United States, 95 U. S., 285, 287, so that the Court cannot entertain it, then the Court's disposition of it does not affect the original judgment. But the disposition of such a motion or petition when it is presented by a party entitled to do so within the proper time is in effect a re-entry of the original judgment appealed from.

The principle for which we are contending is nowhere expressed more simply or clearly than by Chief Justice Fuller as follows:

"* * * if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. Aspen Mining & Smelting Co. *v.* Billings, 150 U. S., 31; Voorhees *v.* Noye Manufacturing Co., 151 U. S., 135; Brocket *v.* Brocket, 2 How., 238 249; Texas & Pacific Railway *v.* Murphy, 111 U. S., 488; Memphis *v.* Brown, 94 U. S., 715; Northern Pacific Railroad *v.* Holmes, 155 U. S., 137."

Kingman *v.* Western Manufacturing Co., 170 U. S., 675, 678.

## POINT II.

### The question raised by this appeal has never been passed upon by this Court, and cannot, therefore, be disposed of on motion to affirm.

The question arising on the merits is not of a character to be disposed of on a motion to affirm.

Opposing counsel himself does not assert that this Court has ever determined the proper rule of setoff applicable to the facts involved in the case at bar. He cites the recent decision in the New York Court of Appeals with opinion by Chief Judge Cullen in *Frank* v. *Mercantile National Bank*, 182 N. Y., 264, to show that there is a uniformity of decision in construing the provisions of the Bankrupt Law on the question involved in this appeal.

We have attached as an *addendum* to this brief the full report from the advance sheets, exclusive of the argument of counsel, of that case, as Volume 182 has not yet been published and distributed.

In his opinion, Chief Judge Cullen states expressly that

> *"If the defendant's rights depended on the equitable rule of setoff as it obtains in this State, it is clear that the notes held by it which had not matured at the time of the transfer of the title from the bankrupt to his assignee could not be setoff against the plaintiff's claim. Fera* v. *Wickham (135 N. Y., 223) is a conclusive authority to that effect, and so the respondent's counsel concedes."*

The learned Court of Appeals, speaking by its Chief Judge, holds, however, that a different principle of setoff is required to be applied by the terms of the Bankrupt Law, and cites a number of de-

visions in the District and Circuit Courts as authority for this interpretation of the statute.

We have had occasion in the Circuit Court of Appeals to discuss these decisions with the result that the Circuit Court of Appeals based its opinion upon the definition of the word "debt," contained in Section 1, Subdivision (11) of the Act, which it read into Section 68 providing for setoff. One of the Judges upon the oral argument stated that the former decisions of this Court were based upon the law of '67, which provided no definition for the term "debt," and so made applicable the ordinary legal and equitable principles of setoff.

The Court of Appeals of New York has gone farther, however, in this connection, and in the course of his opinion Chief Judge Cullen observes:

> "Moreover the very point seems to have been decided by the Supreme Court of the United States in *Scammon* v. *Kimball*, 92 U. S., 362, which arose under the Bankrupt Law of 1867, the provisions of which so far as they deal with the questions involved in this case are substantially the same as the present law."

*Scammon* v. *Kimball* was an action by a policyholder against the assignee in bankruptcy of a fire insurance company and the complainant therein was allowed to set off the sum owing him on certain policies against the claim of the assignee for money on deposit with him as banker.

It is not in the report of *Scammon* v. *Kimball* that the learned Chief Judge finds authority for his assertion that the decision indicates an opinion by this Court on the same question that is involved herein. To quote his own language:

> "The report of the case does not show when the claim on the insurance policies matured, but that fact appears from the

> opinions in two subsequent cases decided by the same court (*Carr* v. *Hamilton*, 129 U. S., 249 (252); *Scott* v. *Armstrong*, 146 *id.*, 499) in which it is stated that the claim for fire losses in the *Scammon* case did not mature until after the *insolvency* of the insurance company."

The question before this Court is not whether a setoff of the character sought is permissible when the debt which is to be setoff was not matured at the time of the *insolvency;* the question for determination is whether a setoff is permitted when the claim which is to be setoff was not matured when *the trustee in bankruptcy* took title to the assets of the insolvent.

Though the Insurance Company in *Scammon* v. *Kimball* was insolvent before the maturity of the obligation sought to be setoff, yet there is no statement in the report nor in the two subsequently decided cases referred to that would indicate that the obligation had not matured at the time of the *filing of the petition* in bankruptcy, and when recourse is had to the records of this Court for the facts, they reveal a case which makes the decision utterly inapplicable to the appeal *sub judice.*

The printed record, exclusive of the briefs of counsel, in Scammon *vs.* Kimball, is found in Vol. 5, October Term, 1875, page 3960 (Transcript of Records, 1875, on file in the office of the Supreme Court U. S.). On page 3966 of these records the answer to the original bill of the complainant Scammon contains the following uncontroverted statement:

> "That the petition to declare said Company bankrupt was filed in the District Court of the United States for the Northern District of Illinois by one Franklin McVeagh on the *20th day of January, A. D. 1872;* that said Company was on said peti-

> tion adjudicated bankrupt by decree of said District Court on the 27th day of January, A. D. 1872."

Among the stipulated facts in the case we find, page 3969:

> "That at the time of the fire on the 8th and 9th days of October, A. D. 1871, J. Young Scammon (the complainant) held policies or contracts of insurance of the Mutual Insurance Company, upon which losses were then sustained to the amount of Forty-five Thousand Fifteen 33/100 dollars ($45,015.33), and that *that sum became due thereupon to said Scammon from said Company sixty days after notice, on proofs once* (the brief for appellant has *'at once,'* which was doubtless the fact) made to said Company under such policies," etc.

It is therefore obvious that at the time of filing the petition in bankruptcy, viz., the 20th day of January, 1872, three months and eleven days after the fire, all the conditions required to mature the obligation upon the policies had been performed, and the amount thereof was then due and payable, so that the equity jurisdiction exercised by the Court was the ancient and ordinary set-off of debts that were both due and payable before the intervention of the bankruptcy proceedings. The question whether the deposit held by the complainant could have been used as a set-off against the claim of the trustee in bankruptcy in case the conditions required to mature the policies had not been performed at the time of the institution of the bankruptcy proceedings was, therefore, not before the Court and certainly was not decided.

We have never asserted that it is not permitted to a solvent creditor, against whom exists a present claim to set off against it an unmatured claim

against his insolvent debtor, where the rights of the parties only are involved. This is the principle adverted to by the Judges in the *dicta* of their opinions in the cases referred to by Chief Judge Cullen. But when insolvency of one of the debtors and proceedings for the benefit of all his creditors intervene between the respective dates of maturity of the two debts, then there is, or there is not, a right of equitable set-off of the debts according to which of the two debts it is that matures before the bankruptcy.

In Scott *v.* Armstrong the question to be determined was whether a creditor with a present claim against an insolvent could precipitate the date of maturity of the claim the insolvent had against him. That principle is not involved in the appeal at bar. It constitutes an entirely different case.

The distinction is made obvious by the following from the opinion of Mr. Justice Peckham in the Court of Appeals of New York:

> "But where a debt is due from the insolvent, *and it is a debt from the other party to the insolvent which is not due*, the Court does not change the contract against the will of the parties, but it simply takes the waiver of the debtor whose debt is not yet due, and only by his consent and at his request treats it as due at once."
>
> Richards *v.* LaTourette, 119 N. Y., 54, 59.

And again:

> "It has been frequently held that, as to the right of setoff in equity, the fact that the debt owing to the insolvent is not due when he makes an assignment is entirely immaterial. The setting it up as an offset is a waiver by the debtor of any defense upon the ground that the debt is not due, and such waiver of the right to demand the full time

> in which to pay his debt can lawfully and properly be made by *the debtor.*"
>
> Opinion of the Court per Peckham, *J.*, in Rothschild *v.* Mack, 115 N. Y., 1, 8.

We submit, with all respect, that Chief Judge Cullen was mistaken in the statement

> "That the law of equitable setoff in the Supreme Court of the United States seems to be different from that which prevails with us."

Schuler *v.* Israel (120 U. S., 506), which he cites to substantiate his claim of a conflict of authority, states no different rule than that contained in Fera *v.* Wickham *et al.*, 135 N. Y., 223, where on page 227 of the opinion Judge Gray says:

> "The natural equity in offsetting cross demands, which had its rise in the rule of the civil law, was soon adopted by the Court of Chancery in cases where, from the situation of the parties, cross actions at law were inadequate. Hence, if one of the parties should become insolvent, the insolvency was recognized as presenting a case for equitable interference. *But the rule was limited in its application to cases where the equitable rights of others were not interfered with.*"

And Judge Gray, in disposing of the issue actually before the Court in Fera *v.* Wickham, stated the equitable doctrine in the following manner:

> "The question here is whether the plaintiff has an equitable right to an offset of his demand against the insolvent estate which had not matured at the time of the assignment, but which did subsequently mature before the demand held by the assignee against him matured. In the solution of this question we might find some embarrassment in endeavoring to reconcile expressions of opinion by the

> judges in earlier cases, and after a very careful consideration I am disposed to hold that by an assignment in trust for the assignor's creditors, what natural equities previously existed become suspended by an intervention of the rights of other creditors.
>
> Fera *v.* Wickham *et al.*, 135 N. Y., 226, 227.

The apparent misapprehension in the mind of Chief Judge Cullen that there exists any conflict between the decisions of this Court and the Court of Appeals on the subject of equitable setoff seems to issue from the case of Carr *v.* Hamilton, in which this Court in treating of the present value of life insurance policies as property and objects of setoff, established a different rule from that which had been held by the Court of Appeals of the State of New York. This view did not arise from any difference of opinion as to the law involved with regard to equitable setoff, but was predicated upon a difference in the manner in which the respective courts regarded the cash surrender value of a policy.

In *Carr* v. *Hamilton,* the appellant supported his contention by the case of Newcomb *v.* Almy, 96 N. Y., 308. The following excerpt from the opinion of this Court, delivered by Mr. Justice Bradley, clears up the difficulty experienced by Chief Judge Cullen in contrasting the decisions:

> "That case (Newcomb *v.* Almy) was almost parallel with the present one, and the claim of setoff was disallowed. The suit was brought by the receiver of an insolvent life insurance company against the holder of an endowment policy issued by the company to recover the amount of a promissory note. The defendant, as in this case, sought to set off the value of his policy against the note. The policy was not yet due and in case the defendant died before it became due, the

amount was payable to his wife. The court assumed that the interests of the assured and his wife were so involved together that they could not be separated; and that it did not yet appear who would be entitled to the insurance,—not adverting to the fact that the interests of all the parties became fixed by the insolvency of the company, and must be computed as expectancies reduced to present values. It is true, the court does, in the next sentence, concede that the policy had a reserve value,—but asks, 'To whom was that value payable?' The plain answer was at hand, that the reserve value of each person's interest was payable to him or her. We cannot but think that if the true character of the interests in question had been brought to the attention of that learned court, it would have come to a different conclusion from that which was reached."

Carr *v.* Hamilton, 129 U. S., 259, 260.

The doctrine of equitable setoff established by decisions of this Court is not different from that contained in the decisions of the State of New York, and of the highest courts of other jurisdictions.

Matter of Hatch, 155 N. Y., 401, 405.

Manufacturers National Bank *v.* Jones, 2 Pennyp., 377.

Chipman *v.* National Bank, 120 Pa., 86.

Jones *v.* Piening, 85 Wis., 264.

Union National Bank *v.* Hicks, 67 Wis., 192.

Oakman *v.* Batavian Bank, 77 Wis., 501.

McCagg *v.* Woodman, 28 Ill., 84.

Counsel for appellee upon this motion has not referred the Court to any of its decisions showing that Section 68 of the present act and its corre-

sponding provision of the former acts provided a different rule with regard to equitable setoff from the general rule of equitable setoff, for which the appellant is here contending. On the contrary, the cases in this Court under the Act of 1867 established this principle, that the section relating to setoffs:

"Was not intended to enlarge the doctrine of setoff or to enable a party to make a setoff in cases where the principles of legal and equitable setoff did not previously authorize it."

Sawyer *v.* Hoag, 17 Wall., 610 (622 of the opinion of Mr. Justice Miller).

Under the same statute, Mr. Justice Bradley, construing the same section, held that a claim of setoff could be maintained only upon the same general principles of equity recognized by the courts of equity in cases of setoff. In effect, his decision declared that the use of the terms "mutual debts" and "mutual credits" under the act allowed only the application of the legal and equitable doctrines that had already been fixed by the decisions of the courts of law and equity and nothing more.

Gray *v.* Rollo, 18 Wall., 629, 632.
See also Libby *v.* Hopkins, 104 U. S., 303, 309.

That the views expressed by this Court under the former act are still held by it under the present act is evident from the opinion in the case of Western Tie & Timber Co. *v.* Brown, 196 U. S., 502, citing under the former law the decision of this Court in Libby *v.* Hopkins, 104 U. S., 303.

We conclude, therefore, that no decision of this Court has been shown that is decisive against this

appellant. In fact, those cases in which the Court has indicated its views are authority rather for the position of the appellant.

**We, therefore, contend that the question arising on the merits is not of a character to be disposed of on a motion to affirm.**

Respectfully submitted,

MARTIN CONBOY,
Of Counsel for Appellant.

## Addendum.

LEO FRANK, as Trustee in Bankruptcy of SOLOMON ULLMAN, Appellant, *v.* THE MERCANTILE NATIONAL BANK OF THE CITY OF NEW YORK, Respondent.

1. BANKRUPTCY—WHEN UNMATURED NOTES OF BANKRUPT MAY BE SET OFF IN ACTION UPON CLAIM AGAINST DEBTOR OF BANKRUPT—WHEN RULE OF FEDERAL COURTS PREVAILS INSTEAD OF RULE IN THIS STATE. Under the U. S. Bankrupt Law (§§ 63, 68) notes made by a bankrupt, but not due at the time of his bankruptcy, are provable against his estate and may, therefore, be set off in an action, brought in the courts of this state by the assignee in bankruptcy, upon a claim against the holder of the notes, but only to the extent necessary to extinguish such claim; since in cases arising under the Bankrupt Law, the courts of this state should be governed by the law of set-off as it prevails in the Federal courts and not by that obtaining in our own courts under which claims unmatured at the time of insolvency cannot be set off against claims held by the assignees of insolvents.

2. WHEN OBLIGATION OF BANKRUPT MAY BE SET OFF ALTHOUGH ACQUIRED AFTER COMMENCEMENT OF PROCEEDINGS. The rule that after insolvency a debtor to the insolvent cannot acquire his obligation for the purpose of using it as a set-off or counterclaim, has no application where the obligation was acquired before the debtor assumed the liability upon which he is sued and, therefore, could not have acquired it for the purpose of using it as a set-off.

*Frank* v. *Mercantile Nat. Bank*, 100 App. Div., 449, affirmed.

(Argued May 30, 1905; decided June 13, 1905.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 23, 1905, which reversed an interlocutory judgment of Special Term sustaining a demurrer to the answer and overruled such demurrer.

The following questions were certified:

"1. Do the first, second, third, fourth, fifth, sixth or seventh counterclaims set forth in the answer of the defendant herein state facts sufficient to constitute a cause of action against the plaintiff?

"2. Are the second, third, fourth, fifth, sixth and seventh set-offs set forth in the answer of the defendant herein insufficient in law upon the face thereof?"

The nature of the action and the facts, so far as material, are stated in the opinion.

CULLEN, *Ch. J.* The action is brought by an assignee in bankruptcy to recover the amount of a deposit made by the bankrupt in the National Broadway Bank. It is alleged in the complaint "that prior to the commencement of the action and in or about the month of May, 1903, the National Broadway Bank duly assigned, transferred and set over to the defendant all the property, assets and effects of said bank, and the defendant agreed to assume the payment of and to pay all the liabilities of said bank." The answer of the defendant admitted the plaintiff's claim and pleaded as a set-off and counterclaim seven promissory notes made by the bankrupt to the National Broadway Bank and assigned to it by that bank in April, 1903. Of these notes only one had matured before the adjudication in bankruptcy. That note is conceded to be a proper set-off. The question presented is whether the defendant has the right to set off the six other notes. The Special Term held that they were not a good

set-off because they had not matured at the time the title passed from the bankrupt to his assignee. The learned Appellate Division has held to the contrary.

If the defendant's rights depended on the equitable rule of set-off as it obtains in this State, it is clear that the notes held by it which had not matured at the time of the transfer of the title from the bankrupt to his assignee could not be set off against the plaintiff's claim. *Fera* v. *Wickham* (135 N. Y., 223) is a conclusive authority to that effect, and so the respondent's counsel concedes. The defendant's claim to a set-off, however, is not based upon the rule in equity which prevails with us, but on the provisions of the Bankrupt Law. Section 68 of that law provides that "In all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." Section 63 provides: "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, * * * with a rebate of interest upon such as were not then payable and did not bear interest."

The argument is that as unmatured claims against the bankrupt are provable against his estate, they necessarily are the subject of set-off under the provisions of Section 68. We think that this position is well taken, but we shall refrain from entering into any discussion of the question, as the proposition seemed to be settled by decisions of the Federal courts. The uniform current of authority in the District and Circuit Courts of the United States is to that effect and the law is so stated in

the text books on bankruptcy. (*Re City Bank of Savings*, Fed. Cas. No. 2,742; *Ex parte Howard Nat. Bank*, Fed. Cas. 6,764; *Re Kalter*, 2 N. B. N. R., 264; *Re Little*, 6 Am. B. R., 681; *Myers* v. *Dickenson*, 5 Am. B. R., 595; *Union Nat. Bank* v. *McKay*, 2 N. B. N. R., 913; *Re Phillip Semmer Glass Co.*, 11 Am. B. R., 665; Collier on Bankruptcy [4th ed.], p. 498; Brandenburg on Bankruptcy, § 1131.)

Moreover the very point seems to have been decided by the Supreme Court of the United States in *Scammon* v. *Kimball* (92 U. S., 362), which arose under the Bankrupt Law of 1867, the provisions of which, so far as they deal with the questions involved in this case, are substantially the same as the present law. (*N. Y. County Bank* v. *Massey*, 192 U. S., 138.) That was an action against the assignee in bankruptcy of a fire insurance company. The complainant was allowed to set off the sums owing him on certain policies as against a claim of the assignee for money on deposit with the complainant as a banker. The report of the case does not show when the claim on the insurance policies matured, but that fact appears from the opinions in two subsequent cases decided by the same court (*Carr* v. *Hamilton*, 129 U. S., 249; *Scott* v. *Armstrong*, 146 *id.*, 499), in which it is stated that the claim for fire losses in the *Scammon* case did not mature until after the insolvency of the insurance company.

It may be further stated that the law of equitable set-off in the Supreme Court of the United States seems to be different from that which prevails with us. In *Schuler* v. *Israel* (120 U. S., 506), which arose out of the attachment of a deposit in a bank, it was held that the bank could, as against the attaching creditor, set off all notes of the debtor in the attachment suit held by it, whether matured or not matured at the time of the attachment. Judge

Miller there said: "While it may be true that in a suit brought by Israel against the bank it could, in an ordinary action at law, only make plea of set-off of so much of Israel's debt to the bank as was then due, it could, by filing a bill in chancery in such case, alleging Israel's insolvency, and that, if it was compelled to pay its own debt to Israel, the debt which Israel owed it, but which was not due, would be lost, be relieved by a proper decree in equity." So also in *Carr* v. *Hamilton* (*supra*), which was an action brought by the receiver of an insolvent life insurance company to foreclose a mortgage given to it by the holder of an endowment policy, the policyholder was allowed to set off as against the mortgage the present value of the policy which would not mature for some years. As the Bankrupt Law operates through the whole country, the construction to be given to it must necessarily be uniform throughout all the States, not varying with the local law. Therefore, in construing it we should be governed by the law of set-off as it prevails in the Federal courts and not in our own. In the light of the decisions quoted, as well as under the terms of the Bankrupt Law, we conclude that the defendant had the right to set off the notes which it held against the bankrupt, even though these notes had not matured at the time of the insolvency.

The counsel for the appellant objects to the validity of the set-off on the further ground that the defendant acquired the notes in controversy after the proceedings in insolvency. It is, doubtless, as claimed, the law that after insolvency a debtor to the insolvent cannot acquire his obligation for the purpose of using it as a set-off or counterclaim. It was stated on the argument of this appeal that the notes were acquired in the same transaction by which the defendant assumed the liability on which it is now sued; that is to say, when it took over the

assets of the National Broadway Bank, in consideration thereof it assumed this obligation. This fact was not challenged on the argument, although it does not seem to be distinctly stated in the answer. Nevertheless, it does appear by the allegations of the complaint and answer that the defendant acquired the notes in April, 1903, while it assumed the obligation on which it is sued in May of that year. As on the face of the pleadings the notes were acquired before any obligation was entered into by the defendant to pay the plaintiff's claim, it is difficult to see how they could have been procured with any intention to defeat that claim. Doubtless, the fact is as was stated by the counsel, and we have, therefore, treated the defendant as being in the same position and entitled to the same rights as those occupied and possessed by the Broadway bank previous to the assignment.

Of course, the defendant is not entitled to any affirmative judgment against the assignee for the excess in the amount of the notes over the amount of the deposit. It is entitled to use those notes solely as a set-off. The judgment of the Appellate Division simply overrules the demurrer without stating the extent of the relief to be awarded the defendant. The opinion, however, shows that the Court intended to allow the defendant's counterclaim only to the extent necessary to extinguish the plaintiff's claim.

The order and interlocutory judgment appealed from should be affirmed, with costs, and the questions certified answered in the affirmative.

Gray, O'Brien, Bartlett, Haight, Vann and Werner, *JJ.*, concur.

Order affirmed.